Mar 10 2000

(26)

Supreme Court, U.S.
FILED
MAR 10 2000
CLERK

No. 99-474

IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

27 pp

Table of Contents.

Page

ARGUMENT

I. THE MASSACHUSETTS BURMA LAW IS NOT PREEMPTED BY THE LATER FEDERAL STATUTE THAT, ACCORDING TO THE UNITED STATES, SHARES THE SAME "ULTIMATE END" AS THE STATE LAW. 1

II. CONSTITUTIONAL TEXT AND HISTORY SUPPORT THE RIGHT OF A STATE TO BOYCOTT FIRMS THAT DO BUSINESS IN A COUNTRY THAT DENIES HUMAN RIGHTS. 3

III. APPLICATION OF THE MARKET PARTICIPANT DOCTRINE TO THE FOREIGN AFFAIRS POWER WOULD ESTABLISH A MANAGEABLE STANDARD FOR JUDICIAL REVIEW OF STATE LAWS AFFECTING FOREIGN AFFAIRS. 9

IV. THE STATE BOYCOTT IS PROPRIETARY, NOT REGULATORY AND, IN ANY EVENT, SATISFIES THE FOREIGN COMMERCE CLAUSE. 13

V. THE COURT SHOULD REJECT THE MOST RECENT VIEW OF THE UNITED STATES AS *AMICUS CURIAE*. 18

CONCLUSION 20

Table of Authorities.

Alden v. Maine,
119 S. Ct. 2240 (1999) 5
Barclays Bank PLC v. Franchise Tax Board,
512 U.S. 298 (1994) ..... *passim*
Container Corp. of America v. Franchise Tax Board,
463 U.S. 159 (1983) 18
Florida Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 1
Gregory v. Ashcroft,
501 U.S. 452 (1991) 2
Hines v. Davidowitz,
312 U.S. 52 (1941) 1
NAACP v. Claiborne Hardware Corp.,
458 U.S. 886 (1982) 16
New Energy Co. v. Limbach,
486 U.S. 269 (1988) 17
Printz v. United States,
521 U.S. 898 (1997) 8
Reeves v. Stake,
447 U.S. 429 (1980) 8, 16
South-Central Timber Development, Inc.
v. Wunnicke,
467 U.S. 82 (1984) 14

United Building & Constr. Trades v. Mayor and Council of City of Camden,
465 U.S. 208 (1984) 12n
United States v. Belmont,
301 U.S. 324 (1937) 11
Wisconsin Public Intervenor v. Mortier,
501 U.S. 597 (1991) 2
Zschernig v. Miller,
389 U.S. 429 (1968) 9, 20

Constitutional Provisions

U.S. Constitution, Art. I, § 8 ..... *passim*
U.S. Constitution, Art. I, § 10 ..... 4, 5, 7
U.S. Constitution, Art. II, § 2, cl. 2 4
U.S. Constitution, Art. III, § 2 ..... 4, 5
U.S. Constitution, Art. VI, § 2 ..... 4, 5
U.S. Constitution, Amend. X 5
U.S. Constitution, Amend. XI 4
U.S. Constitution, Amend. XIV 11n
United States Articles of Confed., art. VI 7

Statutes

Comprehensive Anti-Apartheid Act of 1986,
Pub. L. No. 99-440, 100 Stat. 1086 ..... 3, 18

Export Administration Act of 1979,
50 U.S.C. app. § 2407(c) (West 1991) 12n
Fla. Stat. Ann. § 287.084 (West 2000 Supp.) 15n
International Emergency Economic Powers Act,
50 U.S.C. § 1701 *et seq.* 2
Mass. Gen. Laws Ann. ch. 7, § 22G-22M
(West 1999 ed.) ..... *passim*
Mass. Gen. Laws Ann. ch. 7, § 22G 17
Ohio Rev. Code Ann. § 125.11 (Anderson 1998) 15n
Uruguay Round Agreements Act of 1994 (URAA),
P.L. 103-465, 108 Stat. 4809 19
19 U.S.C. § 3512(b)(2) 19
19 U.S.C. § 3512(c) 19

Miscellaneous.

Max Farrand, ed.,
2 *The Records of the Federal Convention of 1787*
(1911) 6
The Federalist No. 17
(C. Rossiter ed. 1961) 8
The Federalist No. 32
(C. Rossiter ed. 1961) 5
The Federalist No. 42
(C. Rossiter ed. 1961) 6
The Federalist No. 45
(C. Rossiter ed. 1961) 5

The Federalist No. 46
(C. Rossiter ed. 1961) 8
Jack L. Goldsmith,
Federal Courts, Foreign Affairs, and Federalism,
83 Va. L. Rev. 1617 (1997) 7
10 Op. Off. Legal Counsel 49 (1986) 10, 11n, 18, 19
Matthew C. Porterfield,
State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism,
35 Stan. J. Int'l L. 1, 28-30 (1999) 6, 16
Michael D. Ramsey,
The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism,
75 Notre Dame L. Rev. 341, 348 (1999) 7, 8
Laurence H. Tribe,
Constitutional Choices (1985) 15
Washington Post, Dec. 18, 1992 ..... 15n

ARGUMENT

I. THE MASSACHUSETTS BURMA LAW IS NOT PREEMPTED BY THE LATER FEDERAL STATUTE THAT, ACCORDING TO THE UNITED STATES, SHARES THE SAME "ULTIMATE END" AS THE STATE LAW.

A. The NFTC and *amici* argue that the Massachusetts Burma Law is preempted by federal statutes governing economic sanctions against Burma. NFTC Br. at 43-46; Br. *Amicus Curiae* of United States (U.S. Br.) at 30-35. The Court should reject this argument because the Massachusetts law does not conflict with the purposes or objectives of the federal law but rather shares its "ultimate end." U.S. Br. at 31.

The Court should first reject the broad rule of foreign-policy preemption urged by the NFTC. In an age of global procurement and trade, the Court should not apply a rule that presumes preemption or infers conflict from the complaints of foreign countries or mere differences between federal and state law. A "difference" between state and federal law merely "poses, rather than disposes" of the preemption question. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963). In cases concerning foreign affairs, even *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941), recognizes that there may exist a "concurrent state power," albeit a power with a limited reach, and contrasts alien registration laws from state laws "bottomed on the same broad base as [the] power to tax." *Id.* Procurement laws are bottomed on a broad base -- the historic state power to spend tax dollars -- yet are narrow in their scope. They exercise a power of *self-*

government. They should not be held preempted absent a clear statement by Congress to that effect or hard evidence of an actual conflict between federal and state law. A clear statement of intent or hard evidence of conflict is required because the States -- and their congressional supporters -- are entitled to fair notice that proposed federal sanctions might implicitly preempt important rights of the States. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). There is no such notice of Congressional intent to preempt or evidence of actual conflict here.

B. The Massachusetts law does not "undermine[] the President's flexibility and discretion." U.S. Br. at 31. The President -- who issued his Executive Order many months after enactment of the Massachusetts law -- retains the full scope of his authority under the federal law concerning Burma and the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq*. The United States claims -- but does not show -- that the Massachusetts law "is in tension with Congress's purpose to assure that the President has extensive discretion. . . ." U.S. Br. at 32. In this as in other cases of claimed preemption, "Congress is free to find that local regulation does wreak . . . havoc and enact legislation for the purpose of preventing it." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 616 (1991). Congress has not done so here.

Nor does the allegation that the state law "discourages" private activity not prohibited by Congress show preemption. Many state laws impose restrictions on private activity that are different from federal restrictions. Each might be said to "discourage" the private activity or "upset" a "considered federal judgment" not to impose such restrictions. This is not sufficient evidence of conflict, however. *See id.*

There is also no conflict between the Massachusetts law and an alleged "multilateral" approach toward Burma. As

petitioners show in their opening brief, the United States has chosen to use both unilateral and multilateral tools to achieve reform in Burma. *See* Pet. Br. at 23; U.S. Br. at 4. The United States concedes that "the ultimate end sought by the United States and the State is the same: a free and democratic Burma that fully respects the human rights of its people." U.S. Br. at 31; *see also id.* at 2, 3; J.A. 74-75 (European Community's "objections" to Massachusetts law "pertain solely" to "breach" of trade obligations, not "share[d] US concerns about" Burma). The shared goal of state and federal law concerning Burma recalls the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086. That Act shows that Congress does not view state and local divestment and procurement laws as obstacles to unilateral federal or multilateral efforts to promote human rights in a foreign country. More recently, even the Members of Congress supporting the NFTC as *amici* in this Court candidly state that Congress is unlikely to preempt such state laws. Br. *Amici Curiae* of Memb. of Cong. Supporting Resp. at 27; *see also* NFTC Br. at 24. The court below discounted this history when it interpreted the "balance" allegedly struck by Congress in 1996. In fact, that balance likely included the judgments that Congress did not preempt state laws in 1986 and would not preempt similar laws ten years later. The "balance" described by the court below, the NFTC, and *amici* ignores these crucial indicators of legislative intent.

II. CONSTITUTIONAL TEXT AND HISTORY SUPPORT THE RIGHT OF A STATE TO BOYCOTT FIRMS THAT DO BUSINESS IN A COUNTRY THAT DENIES HUMAN RIGHTS.

A. The National Foreign Trade Council (NFTC) and several *amici* argue that the Massachusetts Burma Law "unconstitutionally infringes upon the federal government's exclusive foreign affairs power." NFTC Br. at 10-33; U.S. Br. at 35-38. Since the Framers intended "exclusive" federal *control* over foreign affairs, they argue, a state law is unconstitutional if -- in the view of the Judicial Branch -- the law "makes foreign policy" or "interferes" with federal control, even if the law does not conflict with a treaty, international agreement, or other federal law.

These arguments are more political than textual. The text and structure of the Constitution support the petitioners. The Constitution shows that the Framers expected that the States would have contact with foreign governments and citizens and sometimes provoke lawsuits or worse. U.S. Const. Art. I, § 10 (authorizing agreements between States and foreign countries and certain military actions with consent of Congress); Art. III, § 2 (federal jurisdiction to hear cases between States and foreign parties); Amendment XI (barring suits by "Citizens or Subjects of any Foreign State"). In an effort to block the most dangerous of state actions, the Constitution expressly denies to the States the power, *e.g.*, to engage in war, enter treaties, and levy duties on imports or exports. Art. I, § 10, cls. 1-3. These prohibitions were included despite the broad grants of power to the President and Congress under Articles I and II. *Compare*, *e.g.*, Art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties") and Art. I, § 8 ("The Congress shall have Power . . . To declare War") *with* Art. 1, § 10 (No State shall enter into any Treaty . . . [or] engage in War . . ."). If, as the NFTC argues, the affirmative grants of power to the federal government also enact a *per se*, implied prohibition on any state action adverse to a foreign country, there would have

been no reason to adopt many of the express prohibitions in Article I, § 10.

Other parts of the text similarly support the view that the Court should read any implied prohibition narrowly. As discussed below in Arg. I.B, the Constitution conferred on the federal government the means to control state action affecting foreign affairs through certain specified executive, legislative, and judicial actions. *See* Art. I, § 8 (Foreign Commerce Clause); Art. III, § 2 (judicial power to hear suits by foreign citizens and by United States); and Art. VI, § 2 (supremacy of federal laws, including treaties). Since these means are adequate to establish "uniformity" when the "national interest" so requires (*Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 331 (1994)), the Court should not expand any implied constitutional prohibition to encompass state and local boycotts.

Finally, the Tenth Amendment -- which is not cited by the NFTC or the United States -- also supports a narrow reading of any implied prohibition. The rule of constitutional construction embodied in the Tenth Amendment requires the Court to show caution in implying prohibitions on state action beyond those expressly stated in Article I. *See Alden v. Maine*, 119 S.Ct. 2240, 2259 (1999); *The Federalist* No. 32 at 198 (A. Hamilton) ("exercise of a concurrent jurisdiction" by the States not prohibited by implication even if it results in "occasional interferences in the policy of any branch of administration"); No. 45 at 292-93 (J. Madison) (C. Rossiter ed. 1961). For all of these reasons, the Court should read Articles I, II, and III in light of the Tenth Amendment and hold that the Constitution does not impliedly prohibit state and local boycotts concerning foreign affairs.

B. The NFTC and *amici* rely heavily on statements made at the time of the drafting and adoption of the Constitution.

See NFTC Br. at 11-19; U.S. Br. at 11-13. Neither the NFTC nor *amici*, however, cite a single statement by anyone present at the Constitutional Convention or state ratifying conventions, or writing at the time of the conventions, that the States were to be prohibited from boycotts. That silence is crucial in this case. The Framers and their critics had personal knowledge of the use of boycotts in aid of liberty. *See* Pet. Br. at 29; Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1, 28-30 (1999). If Articles I or II were understood to deny implicitly the right of the States to boycott, someone would have noticed.

The Convention did expressly address the question of state embargoes. Madison proposed to include them in the list of actions prohibited to the States. *See* 2 *The Records of Federal Convention of 1787*, at 440-41 (Max Farrand ed., 1911). Other delegates opposed the measure; one cited the need for "sudden embargoes during the war, to prevent exports, particularly in the case of a blockade[.]" Another said the provision was "unnecessary; the power of regulating trade between State & State, already vested in the Genl-- Legislature, being sufficient." *Id.*

Of course, the Framers generally discussed the need to confer on the federal government broad powers over foreign affairs. The Framers clearly intended to authorize the Federal Government to control the "power of any indiscreet member to embroil the Confederacy with foreign nations." *The Federalist* No. 42 (Madison) at 265. The existing problem addressed by the Framers, however, was not the absence of direct or implied prohibitions on state action in the Articles of Confederation. In fact, the Articles expressly prohibited the States, without the consent of Congress, from entering into agreements with foreign

nations, engaging in war, from keeping troops or ships of war in time of peace, and from issuing letters of marque and reprisal. U.S. Art. of Confed., art. VI. The Articles similarly prohibited the States from entering treaties or imposing certain tariffs. *Id.* The main problem addressed by the Framers was instead the more fundamental failures of the Articles: the fact that they "lacked an effective supremacy clause, executive, or judiciary, and Congress lacked adequate power to raise revenue or control the states in foreign relations." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1643 (1997). Without these features, the central government lacked the means to control state actions affecting military security, trade, and diplomacy.

The remedy enacted by the Constitution of 1787, however, was not to nullify all state actions adversely affecting foreign governments or citizens. Rather, the Framers controlled the States by (1) reenacting in Article I, § 10, the specific prohibitions on state action contained in the Articles of Confederation; (2) giving Congress and the new President broader foreign relations powers, including power under the Foreign Commerce Clause; and (3) creating a more powerful Supremacy Clause, enforceable by the Judicial Branch, to ensure compliance with enacted federal law, such as statutes and treaties. *See* Goldsmith at 1645. "Taken together, these mechanisms ensured state compliance with the political branches' foreign relations enactments. But they left the determination of when the national interest would be best served by the exclusion of state power largely to the discretion of the federal political branches." *Id.* They did not intend a broad, implied nullification of any state law deemed to be "foreign policy." *See* Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L.

Rev. 341, 348 (1999). In fact, in the case of embargoes, taxes on exports, and tonnage duties, the delegates *debated* proposals for express prohibitions on these subjects because they did not believe that the general powers over foreign affairs granted to the federal government impliedly precluded state action of these types. *Id.* at 415 and nn. 258-264.

The categorical rule urged by the NFTC also contradicts the Framers' attempt to preserve state lawmaking as an essential part of the federal-state balance. *See The Federalist* No. 17 at 119 (A. Hamilton); No. 46 at 298 (J. Madison). The States were preserved in part to foster competition in public policy and to aid the federal government through state experimentation. *See Reeves v. Stake*, 447 U.S. 429, 441 (1980). The Framers also believed that, for federal power to be effectively cabined, the States must retain the confidence of their citizens. *See Printz v. United States*, 521 U.S. 898, 920 (1997). The bond between citizen and State will be frayed if a State is powerless to reflect its citizens' concern for human rights in a simple choice of vendors.

Recent state and local action concerning foreign affairs reflects the beneficial role of the States intended by the Framers. The course of legislation regarding South Africa in the 1980s shows the value of allowing States to inform federal policy by state action. Similarly, according to the court below, the Massachusetts Burma Law "may" have been a "catalyst for federal sanctions." Pet. App. 73. While the *amici* "Former United States Government Officials" decry the less- "informed judgments" of the States, their roster recalls still other trying times when private and state action foreshadowed a change in the foreign policy "preferred by federal officials." Br. of *Amici Curiae* Former United States Gov't Officials at 14.

Thus the historical evidence supporting federal *control* over foreign affairs does not render a state boycott concerning a

foreign country unconstitutional. Rather, the evidence shows that the Framers intended to ensure federal exclusivity in those cases when the political branches wished to establish national uniformity through a statute or treaty. *That* "exclusive" power is not threatened here. To the extent that the Court has inferred a broader, implied constitutional prohibition, it should decline to apply it to the boycott at issue.

III. APPLICATION OF THE MARKET PARTICIPANT DOCTRINE TO THE FOREIGN AFFAIRS POWER WOULD ESTABLISH A MANAGEABLE STANDARD FOR JUDICIAL REVIEW OF STATE LAWS AFFECTING FOREIGN AFFAIRS.

In support of their argument under the foreign affairs power, the NFTC and *amici* repeatedly cite *Zschernig v. Miller*, 389 U.S. 429 (1968). That case is unique: it represents the only time in our history that the Court has struck down a state law under the "dormant foreign affairs power." Pet. App. 30.

Zschernig did not address state spending powers but rather concerned the regulation of private inheritances. The court below stated that the "precise boundaries" of *Zschernig* "are not clear[,]" and "subsequent Supreme Court holdings have done little to clarify the reach of the Court's holding" in that case. Pet. App. 20, 30. No case of this Court addresses the intersection of foreign affairs, state spending, and international trade agreements.

There is accordingly little guidance for the interpretation of the terms and phrases used in *Zschernig*, such as "incidental or indirect" effect or "potential for embarrassment." The NFTC and *amici* have read these terms broadly to invalidate state and local selective purchasing laws, divestment laws, resolutions, and other

state laws adversely affecting foreign countries or firms. For example, the NFTC would strike any state law that is "an exercise in foreign affairs," even a resolution that supports United States foreign policy. NFTC Br. at 24; J.A. 232-33. *Amici* Associated Industries of Massachusetts, *et al.*, would strike any law "making a statement" about foreign affairs or even "disassociating" from them. *Amicus* Washington Legal Foundation would strike divestment laws and resolutions. The European Communities would ban "direct discussions" between the States and foreign countries, while reserving to themselves the right to continue to criticize state laws. *See* Br. *Amici Curiae* of European Communities at 5; J.A. 74.

The United States does not articulate a standard for judicial review but would permit resolutions and allow the States to cancel trade missions. *See* U.S. Br. at 28. The United States does not explain why a State may constitutionally decline to send its officials but not its tax dollars to a country that denies human rights. Regarding divestment laws, the United States says that there is "no occasion" to "consider" their "validity" (*id.* at 29), but it ignores the fact that core political speech underlies resolutions, divestment, and selective purchasing laws. Nor does the United States discuss the obvious fact that divestment concerns the purchase and sale of securities -- just as selective purchasing governs the purchase of goods and services. Each action involves state spending. Nor does the United States acknowledge that divestment laws -- no less than selective purchasing laws -- generally seek to influence change abroad. *See* 10 Op. Off. Legal Counsel 49, n. 2 (1986). Nor does the United States or the NFTC explain how a court reviewing divestment laws might judge the rate of investment or divestment or mere decisions to diversify. *See* Br. *Amici Curiae* of Memb. of Cong. Supporting. Pet. at 23 n.15 (quotation omitted). In

short, nothing in the briefs of the NFTC or the United States states a manageable judicial standard to determine which state actions affecting foreign countries are unconstitutional.

In contrast, the petitioners have described at least two classes of state laws that should be upheld as constitutional despite their relation to foreign affairs: (1) state laws that Congress has implicitly permitted, and (2) state laws that represent proprietary activity.

These standards should be adopted for three reasons. First, for the reasons stated in Arg. II, above, clear standards protecting certain state laws are consistent with the terms, structure, and history of the Constitution. The Court could sustain these laws while continuing to enforce the express prohibitions on state action in Article I and federal statutes and treaties through the Supremacy Clause. *See, e.g., United States v. Belmont*, 301 U.S. 324 (1937).

Second, the rules proposed by petitioners have been already applied by the Court and are workable. *See Barclays*, 512 U.S. at 320-31 (applying "implicit permission" test to claim under the "one voice" prong of review under the Foreign Commerce Clause); Pet. Br. at 25-36 (collecting cases on market participation doctrine).[1]

---

[1] The NFTC and United States both ignore the fact that the Department of Justice in 1986 opined that the market participation doctrine applies to the dormant foreign affairs power. The United States in this case concedes that the doctrine applies to the Foreign Commerce Clause. U.S. Br. at 25. The Department of Justice in 1986 correctly stated that neither the dormant foreign commerce or foreign affairs power implies the displacement of state proprietary action. *See also* Br. *Amici Curiae* of States of North Dakota, *et al.* Cases involving a "direct restraint on state action" -- such as the Fourteenth Amendment

Third, the standards proposed by the petitioners would promote the separation of powers. In a case involving a state law, the Court has said that the "judiciary is not vested with power to decide how to balance a particular risk of retaliation [by foreign countries] against the sovereign right of the United States as a whole to let the States [act] as they please." *Barclays*, 512 U.S. at 328. According to the Members of Congress supporting the NFTC, "federal judges have little or no experience with foreign policy matters . . . and lack political accountability . . . ." Br. *Amici Curiae* of Memb. of Cong. Supporting Resp. at 24-25. By excluding two clear categories of state action from constitutional review, the Court would divert constitutional claims to the branches with greater expertise and accountability.[2]

---

and the Privileges and Immunities Clause -- do not govern the question of market participation presented here. *See United Building & Constr. Trades v. Mayor and Council of City of Camden*, 465 U.S. 208, 220 (1984).

[2] Members of Congress supporting the NFTC turn *Barclays* on its head with their argument that a *per se* ban on state laws affecting foreign affairs, if declared by the Court, would "avoid the need for precise evaluations of foreign policy by federal judges." Br. at 26. The Members argue, in effect, that since judges are not competent to *adjudicate* questions about the validity of individual state laws, the Court should *legislate* a *per se* rule nullifying them all.

The same Members are too modest about the ability of Congress to legislate in the area. *See id.* at 27. Congress need not "make itself aware" of "thousands of state and local governments": it may legislate by type of state law, by country, or by other familiar means. *See, e.g.*, Export Administration Act

Congress has similarly limited the judicial role through federal acts endorsing recent international trade agreements. In federal statutes implementing the North American Free Trade Agreement (NAFTA) and General Agreements on Tariffs and Trade (GATT), Congress has recognized that the States have expanding roles in global procurement and trade and may be subject to foreign complaints. At the same time, however, Congress has expressly limited the role of the courts in cases brought under NAFTA and GATT, particularly private claims based on Congress's Commerce Clause authority. *See* Pet. Br. at 20; Br. *Amici Curiae* of Memb. of Cong. Supporting Pet. at 7-11.

Finally, by limiting the judicial role through clear standards protecting state authority, the Court would protect the power of the Executive. "Executive power is . . . improperly diminished when a court strikes down a state law on the basis of a foreign complaint that the President has determined to resist." Br. *Amicus Curiae* of United States, Arg. 1.a, *Barclays*, *supra* (Nos. 92-1384 and 92-1839). In order to protect the separation of powers and federalism, the Court should apply the clear standards urged by petitioners here.

IV. THE STATE BOYCOTT IS PROPRIETARY, NOT REGULATORY AND, IN ANY EVENT, SATISFIES THE FOREIGN COMMERCE CLAUSE.

A. Petitioners show in their opening brief that the Massachusetts law governing state procurement is proprietary and therefore unlike the regulation of private investment enacted by

---

of 1979, 50 U.S.C. App. § 2407(c) (West 1991) .

Congress in 1996. *See* Pet. Br. at 25-36. In reply, the NFTC and the United States essentially argue the state law is regulatory because its purpose and effect "regulate" conduct beyond bidding and procurement in Massachusetts. "But, of course, this is not a 'reason' at all, but merely a restatement of the conclusion. The line between participation and regulation is what we are trying to determine. To invoke that very distinction in support of the line drawn is merely to fall back again on intuition." *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 102 n.* (1984) (Rehnquist, J., joined by O'Connor, J., dissenting).

The NFTC also exaggerates the importance of one purpose of the state law. As petitioners show in their opening brief, the Massachusetts law was enacted to disassociate Massachusetts from the denial of human rights in Burma. *See* J.A. 51-52. The fact that supporters of the law also stated their hope that state action might spur reform in Burma does not change the proprietary nature of procurement. For example, Massachusetts could have chosen to subsidize companies that do no business with Burma, while stating a similar wish to induce reform there. Or Massachusetts could have paid certain contractors to withdraw from existing state contracts, to the same end. In each case, the desire to improve conditions in Burma would not change the nature of these proprietary acts. When the selective purchasing law is viewed in this broader context, it is "unduly formalistic" to conclude that one stated purpose of the law dooms the "path chosen by the State as best suited to promote its concerns . . . ." *South-Central Timber Development, Inc.*, 467 U.S. at 103 (Rehnquist, J., dissenting).

Nor is there any merit to the claim that the extraterritorial *effects* of selective purchasing laws show their "regulatory" nature. Each of the state activities considered in the Court's previous cases concerning market participation plainly or likely

had upstream effects on firms and markets located outside the State. *See* U.S. Brief at 25. In both private and public settings, conditions imposed by major purchasers will often affect production and distribution by suppliers in other States and countries. This effect, however, does not change the proprietary nature of procurement. Furthermore, denying market participation status to selective purchasing on the ground of "extraterritorial effect" would threaten many other state and local procurement laws concerning the environment and labor conditions. *See* Br. *Amici Curiae* of Nonprofit Org. Supporting Pet. at 24-28. It would also threaten existing state and local laws that use state and local purchasing power expressly to influence other States' policies.[3]

Whatever its extraterritorial effects, procurement remains at bottom a choice to channel state resources to promote local values. "[W]hatever the state's ultimate goal, the state is approaching that goal by channeling its resources into commerce rather than placing restrictions on commerce already in existence." Laurence H. Tribe, *Constitutional Choices* (1985) at

---

[3] Eleven States adjust their competitive bidding laws to benefit in-state businesses. *E.g.*, Ohio Rev. Code Ann. 125.11 (Anderson 1998) (Ohio contractors). Twenty-nine States have retaliated, applying a price preference for in-state products or firms only to the extent that an out-of-state low bidder's state applies a preference. *E.g.*, Fla. Stat. Ann. § 287.084 (West 2000 Supp.) Thus, twenty-nine States seek to influence other States' procurement policies through their own procurement codes. Similarly, several municipal governments joined in a boycott of Colorado in 1992 in protest over a proposed amendment to the State's constitution. *See* Gary Lee, *Mayors Join Boycott, Cancel Colorado Conference*, Wash. Post. Dec. 18, 1992, at A3.

145. "In procuring goods and services for the operation of government, a State may act without regard to the private marketplace and remove itself from the reach of the Commerce Clause." *Reeves*, 447 U.S. at 450 (Powell, J., dissenting). Extraterritorial effects -- if any -- of procurement laws do not change the fundamental nature of procurement.

Finally, the NFTC and *amici* err in applying an unreasonably narrow test to determine "market participation." If the Court compares the state law to private conduct, it should ask whether a private market participant *could* act in the way that the State has acted, not whether statistics would show that the average private person would necessarily act in that way, or actually has acted in that way. Here, private parties plainly could act as Massachusetts has acted. Private parties are conducting primary boycotts in droves. *See* Pet. Br. at 30 (collecting authorities); Br. *Amici Curiae* of Council of State Governments, *et al.* at 14. Private parties also can and do use secondary boycotts. From the non-importation boycotts of the 1700s to recent years, private persons have joined secondary boycotts that have subordinated their economic interests to higher ends. *See* Porterfield, *supra*, at 40 n. 259 (citations omitted); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 914-15 (1982) (alleged secondary boycotts protesting racial discrimination did not arise from "parochial economic interests"). Market participant status should not turn on whether the state has boycotted the Government of Burma, Burmese companies, or third parties doing business there.

B. Even if the Massachusetts law is not protected by the market participant doctrine, it should be upheld under the Foreign Commerce Clause. First, the Massachusetts law does not unconstitutionally discriminate against Foreign Commerce because it does not seek a local economic benefit and applies

equally to foreign and domestic firms. *See* Pet. Br. at 46-48. Second, any discrimination is justified by the legitimate state interest in disassociating from countries that deny human rights. As petitioners have explained, this interest is different from a State's interest in inducing reform abroad or expressing disapproval of foreign conduct. *See* Pet. Br. at 48-50; Br. *Amici Curiae* of Council of State Governments, *et al.* at 21-27; Br. *Amici Curiae* of New York City Comptroller, *et al.* at 10. As the court below recognized, the Massachusetts Burma Law was motivated in part by "Massachusetts' desire to eliminate moral taint that it claims it suffers from doing business with firms that do business in Burma . . . ." Pet. App. 47. Massachusetts has a legitimate interest in avoiding this moral taint. Its interest is local -- not "extraterritorial" -- because it concerns public funds raised and spent in Massachusetts for traditional state functions. *See* Mass. Gen. Laws Ann. ch. 7, § 22G (state agencies covered by law).

Nor can Massachusetts tailor its law more narrowly and still adequately serve its interest. The law applies only to state procurement. It must name Burma. It must apply to companies and their affiliates because state tax dollars might flow to Burma indirectly through financially connected firms. A hortatory resolution is not adequate to serve the state interest because State funds might continue to flow to the repressive regime. For these reasons, even if the market participant doctrine does not apply to the state law, it satisfies the Foreign Commerce Clause because "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988).

Third, the Court should reject the claim that the law "impairs the federal government's 'one voice' on foreign commerce matters." NFTC Br. at 35-36. This case shows the

danger inherent in using a metaphor as a legal standard. The NFTC, *amici*, and the court below all repeatedly use the phrase. None, however, cites an instance in which a state law has prevented the federal government from establishing a uniform voice when it wished to do so. If, after *Barclays*, the Court will strike state laws addressing certain issues because they "must be left to the federal government," *Container Corp.*, 463 U.S. 159, 194 (1983), it should nevertheless uphold selective purchasing laws. The federal statutes regarding South Africa in 1986 and Burma in 1996 show that Congress does not believe that boycotts of foreign countries "must be left to the federal government," but rather may also be imposed by the States.

V. THE COURT SHOULD REJECT THE MOST RECENT VIEW OF THE UNITED STATES AS *AMICUS CURIAE*.

The United States argues -- apparently for the first time in its history -- that state and local selective purchasing laws concerning a foreign country are unconstitutional. This view is not only unprecedented but also reverses the positions of the Department of Justice in 1986 and the Secretary of State in 1998.

In 1986, the Department of Justice issued an opinion upholding state and local divestment and selective purchasing laws against the same three claims made in this case. The Department opined that the market participation doctrine applies to both the Foreign Commerce Clause and the dormant foreign affairs powers. It accordingly stated its "belie[f]" that the United States should "not . . . file suit to invalidate these laws or file any *amicus* brief on behalf of those seeking to invalidate them." 10 Op. Off. of Legal Counsel 49 (1986).

In April, 1998, the Secretary of State told the National

Conference of State Legislatures that she and "President Clinton recognize the *authority* of state and local officials to determine their own investment and procurement policies, and the *right* -- indeed their responsibility -- to take moral considerations into account as they do so." Statement of April 17, 1998, J.A. 196 (emphasis added).

The United States now states that the 1986 opinion "no longer represents the position of the United States" (U.S. Br. at 29 n.23); its brief does not cite the 1998 statement of the Secretary of State at all. In light of these reversals, the Court should give no weight to the current brief of the United States. In similar circumstances, the Court has expressly declined to rely on "Executive statements" and "briefs filed" by the United States "criticizing" state action. *Barclays*, 512 U.S. at 328-330 and n. 32 (majority opinion) and 334 (O'Connor, J., concurring in part and dissenting in part). It should decline to do so again.

The views of the United States as *amicus curiae* deserve even less weight here, given its failure to act to avoid the constitutional questions. If the United States had credited the claims of Europe and Japan under GATT, it could have sued Massachusetts under the Uruguay Round Agreements Act of 1994 (URAA), P.L. 103-465, 108 Stat. 4809, 19 U.S.C. § 3512 (b)(2) and (c). It did not. Instead, it has pledged a vigorous defense of the same complaints and may soon resume that role. R. 425; Br. *Amici Curiae* of Eur. Comm. at 7 ("EU will begin new WTO proceedings" if the Court upholds state law). Alternatively, the Executive could have urged Congress to preempt certain state laws. It did not. Rather than exercise its own powers, the Executive has asked the *Judicial* Branch to strike state selective purchasing laws on *constitutional* grounds, thus inviting the Court to exercise the very power it disclaimed in *Barclays*, that is, "to evaluate whether the national interest is best

served" by the state law. *Id.* at 331. By declining to sue under the URRA, pledging a strong defense of the state law at the World Trade Organization, and failing to ask Congress to preempt state boycotts, all while encouraging the States to exercise their "authority" and "right" to boycott (J.A. 196), the United States has failed to exercise its executive powers, fueled a constitutional dispute, and miscast the Court as "the overseer of our Government." *Barclays*, 512 U.S. at 330.

In his concurring opinion in *Zschernig*, Justice Stewart stated his doubts about the relevance of the position of the United States expressed as an *amicus* supporting Oregon. "Resolution of so fundamental a constitutional issue," he wrote, "cannot vary from day to day with the shifting winds at the State Department." *Zschernig*, 389 U.S. at 443. The most recent gust from the Department of Justice vindicates this view.

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment of the Court of Appeals for the First Circuit should be reversed.

THOMAS F. REILLY
Attorney General
of Massachusetts

THOMAS A. BARNICO*
JAMES A. SWEENEY
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2086
**Counsel of Record*

Dated: March 7, 2000